



Comptroller General
of the United States

Washington, D.C. 20548

Shimamura

Decision

Matter of: The Forestry Association, Inc.

File: B-236240

Date: September 28, 1989

DIGEST

1. General Accounting Office will not review an affirmative responsibility determination absent a showing of possible fraud or bad faith or that definitive responsibility criteria were not applied.
2. Protest of inconsistent application of labor laws by Department of Labor offices in different states is a matter for consideration by that agency and not the General Accounting Office.

DECISION

The Forestry Association, Inc., the second low bidder, protests the award of a contract to Stacey Harris and Associates under invitation for bids (IFB) No. R3-89-18, issued by the Forest Service, U.S. Department of Agriculture, for timber stand examination services in the Apache-Sitgreaves National Forest. The examination of timber is required to be conducted 5 years in advance of timber sales scheduled for 1994 in the Alpine Ranger District of the forest, which is located in Arizona. Forestry Association contends that Stacey Harris is not a responsible firm and that there was unequal competition among bidders operating in different states because the Department of Labor (DOL) does not administer labor laws consistently in all states.

We deny the protest.

Four bids were received by the May 18, 1989, bid opening date. Stacey Harris submitted the low bid of \$48,997; Forestry Association was second lowest with a \$59,529 bid. After reviewing the low bid and the government estimate of \$43,280, Stacey Harris' bid was determined to be reasonable.

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Prior to contract award, however, Forestry Association requested that the contracting officer consider certain allegations concerning Stacey Harris in making his responsibility determination. Forestry Association alleged that Stacey Harris employs its personnel as independent contractors in order to avoid various requirements, such as accounting for wages, benefits and overtime pay, paying certain taxes and withholding income taxes. Additionally, the protester alleged that Stacey Harris does not provide workers' compensation insurance for its personnel and does not pay state sales and gross receipts taxes. The protester contends that if the awardee were to include the cost of the above items in its price, its bid would have been nearly \$2,000 higher than that of Forestry Association.

The agency states that the contracting officer investigated the allegations by calling DOL's offices in Arizona and Colorado, the Arizona Department of Revenue and the Arizona Industrial Commission. The agency found that DOL's Colorado office had earlier investigated complaints lodged against Stacey Harris and found the company to be in compliance with DOL's rules and regulations. No other office reported any complaints against Stacey Harris. After conducting the survey, the contracting officer made an affirmative determination of responsibility and awarded the contract to Stacey Harris on June 22.

Forestry Association contends that the contracting officer should have found the awardee to be nonresponsible and forwarded that determination to the Small Business Administration (SBA) for consideration under its certificate of competency procedures.

By asking our Office to find that a referral to SBA was required, the protester in effect is asking us to review the contracting officer's determination that Stacey Harris is a responsible firm. We do not review an affirmative determination of responsibility, however, absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5) (1989); Urethane Prods. Corp., B-234694, May 25, 1989, 89-1 CPD ¶ 508. No such showing has been made here.

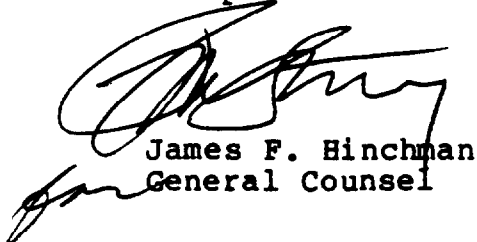
While the protester contends that the contracting officer acted in bad faith by not finding Stacey Harris nonresponsible in the face of the protester's contentions regarding Stacey Harris' alleged noncompliance with various tax and

labor law requirements, we see no basis for such a conclusion. On the contrary, when presented with the protester's allegations, the contracting officer investigated and found no evidence of noncompliance. The protester, while conceding that the contracting officer contacted the appropriate authorities in Arizona and Colorado, argues that the contracting officer should have investigated Stacey Harris' record in New Mexico as well. In our view the contracting officer was not required to do so simply on the basis of unsupported statements from Forestry Association, a disappointed bidder, particularly since he already had investigated the protester's other allegations and found no support for them.

Forestry Association also contends that firms competed on an unequal basis because DOL's offices in New Mexico and Colorado administer regulations implementing the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1982), and the Service Contract Act, 41 U.S.C. §§ 351 et seq. (1982), in an inconsistent way. The protester alleges that since the DOL office in New Mexico, where its firm is located, implements the labor regulations in a more stringent manner than the Colorado office, where the awardee is located, its firm was required to add more overhead and assume more of a risk than Stacey Harris in the preparation of its bid, thus resulting in its higher bid price.

Our Office does not review allegations regarding the implementation of the Fair Labor Standards Act or the Service Contract Act. Concerns with regard to the inconsistent application of the statutory requirements should be raised with the Wage and Hour Division in the Department of Labor, the agency which is statutorily charged with the responsibility for the implementation of the Act. See 29 U.S.C. § 204; 41 U.S.C. § 353(a); Associated Naval Architects, Inc., B-221203, Dec. 12, 1985, 85-2 CPD ¶ 652.

The protest is denied.



James F. Hinchman
General Counsel